

## CHAPTER 2 GENERAL ENFORCEMENT PROCEDURES

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## CHAPTER 2 GENERAL ENFORCEMENT PROCEDURES

This chapter<sup>1</sup> provides guidance on the procedures that DEQ staff use to address issues concerning, and alleged violations of, enforceable environmental requirements,<sup>2</sup> including: (1) notifying responsible parties (RPs); (2) referring cases for enforcement action and deciding on a plan for the case; (3)-(4) resolving enforcement cases with and without RP consent; (5) special procedures for underground storage tanks (USTs) and for sanitary sewer overflows (SSOs); (6) monitoring enforcement orders and agreements; and (7) closing enforcement cases.

DEQ staff use the full range of enforcement procedures and select the most appropriate one(s) for each case. The procedures are generally listed in increasing order of severity. While staff begin with the least adversarial method appropriate to the case, selecting a procedure lies wholly in DEQ's discretion, within law and regulation. DEQ encourages open discussion between the Regional Offices (ROs), Central Office (CO) Program Offices, and the CO Division of Enforcement (DE) to ensure that enforcement actions support the goals listed in Chapter 1.

### I. NOTIFYING RESPONSIBLE PARTIES

DEQ staff use three types of written correspondence to notify RPs of issues or alleged violations: [Informal Corrections](#), [Warning Letters](#), and [Notices of Violation](#) (NOVs). Informal Corrections and Warning Letters are issued by DEQ compliance staff. NOVs mark the transition from compliance to enforcement. Compliance, enforcement, and (as needed) permitting and program staff should consult on the NOV before issuance. Part I of this chapter provides guidance for all three types of notification and specific instruction for areas without program guidance. Program guidance may supplement Part I of this chapter and modify the timelines for Informal Corrections before issuing Warning Letters.

#### A. *INFORMAL CORRECTIONS*

##### 1. Circumstances for Informal Corrections

DEQ compliance staff use Informal Corrections to notify the RP of issues concerning environmental requirements and to secure compliance when **staff expect that a problem can be corrected in 30 days or less**, unless a higher level response is required by law, regulation, or

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<sup>1</sup> Guidance documents set forth presumptive operating procedures. They do not establish or affect legal rights or obligations, do not establish a binding norm, and are not determinative of the issues addressed. Decisions in individual cases will be made by applying the laws, regulations, and policies of the Commonwealth to case-specific facts. See Va. Code [§ 2.2-4001](#). To aid revision, the attachments to Chapter 2 are in a separate chapter, Chapter 2A. This guidance supersedes: (1) Enforcement Guidance Memorandum No. 1-2005 (Revision 1) (September 25, 2008); (2) 1999 Enforcement Manual Sections I (D)-(J), and III; (3) Revisions to Chapter 2, Part II, Case Closure and attachments (November 24, 2009); and (4) Enforcement Guidance Memorandum No. 1-2007 (June 29, 2007).

<sup>2</sup> "Enforceable environmental requirements" or "environmental requirements" mean the statutes, regulations, case decisions (including but not limited to permits and orders), decrees, or certifications that are enforceable by one of the three citizens' boards (State Air Pollution Control Board, State Water Control Board (SWCB), or Virginia Waste Management Board) or by DEQ.

guidance. If the RP completes and documents a satisfactory and durable return to compliance within the time allowed, the matter can be closed without further action. Situations that meet **all** of the following criteria may be appropriate for Informal Correction:

- Issues that can ordinarily be corrected within 30 days;
- Issues that do not present a substantial or significant threat to human health or the environment, and do not result in actual harm;
- Issues that are not substantial or significant deviations from fundamental components of the regulatory program; and
- RPs/facilities that are infrequent violators (varies by program and the degree of regulatory oversight).

Informal Corrections are not to be used for issues that are alleged violations meeting the criteria for [Warning Letters](#) or for [NOVs](#) (e.g., High-Priority Violators (HPVs) in the Air Program, or Significant Non-Compliers (SNCs) in the Hazardous Waste or Water VPDES Programs).

## **2. Elements of Informal Corrections**

Informal Corrections are initiated in one of several ways: an Informal Correction Letter (ICL), a Request for Corrective (or Compliance) Action (RCA), a Deficiency Letter (DL), or an Inspection Report that identifies one or more issues concerning environmental requirements. Informal Corrections should include a description of the facts underlying each issue and the relevant environmental requirements. Informal Corrections may suggest a corrective action or recite a regulatory requirement, but cannot require or impose a corrective action (e.g., “It is suggested that RP implement the actions it proposed...” or “[9 VAC 25-210-116\(C\)\(2\)](#) provides...”, but not “RP must...”, “RP shall...” or “RP is required to ...”).<sup>3</sup>

Staff must not make a case decision when issuing an Informal Correction or other notification. Under the Administrative Process Act (APA), Va. Code [§ 2.2-4001](#):

"Case" or "case decision" means **any agency proceeding or determination that**, under laws or regulations at the time, **a named party** as a matter of past or present fact, or of threatened or contemplated private action, **either is, is not, or may or may not be (i) in violation of such law or regulation** or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit (emphasis added).

In particular, an Informal Correction should not state that an RP “has violated” or “is in violation of” an environmental requirement, because that might imply incorrectly that DEQ has made a case decision. The RP is entitled to notice and a process to dispute alleged violations before a case decision is made or a corrective action imposed. Because Informal Corrections are developed and used almost exclusively by DEQ media programs, no model documents are provided here.

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<sup>3</sup> The benefit of making a suggestion should be balanced against the risk of making an unintended “case decision” or a suggestion that does not return the RP to compliance.

### 3. Process for Informal Corrections

DEQ compliance staff convey the Informal Correction to the RP promptly after discovering an issue or concern using informal means (onsite conversation, facsimile, email, multi-part form, or letter). DEQ staff may contact the RP by telephone to discuss the issue or hold an informal meeting at the RO or onsite. Usually, the RP informs staff what steps it is undertaking and when they will be complete. Unless the RP provides reliable written or electronic verification of its actions, DEQ staff should verify the RP action onsite. Staff document all contacts, requests to the facility, and RP actions in the DEQ file and the relevant database and may send an acknowledgement ([Attachment 2-1](#)). If the RP does not return to compliance within 30 days (or longer time as prescribed in program guidance) and if the issue or concern describes an alleged violation, staff should issue a [Warning Letter](#).

#### B. *STATUTORY NOTICES OF ALLEGED VIOLATION (NOAVs)*

Virginia statutes establish the elements of “notices of alleged violation” (NOAVs).<sup>4</sup> These are written communications by the Department that must include:

- A description of the facts underlying each alleged violation (the observations);
- The specific provisions of law (or regulation, permit, order or certification) allegedly violated (the legal requirements); and
- Information on the process for obtaining a final decision or fact finding from DEQ on whether or not a violation has occurred.

By statute, the issuance of an NOAV is not a case decision under the APA. Both [Warning Letters](#) and [NOVs](#) include the statutory elements and are types of NOAVs.<sup>5</sup> An NOAV notifies the RP of alleged violations, but the RP is responsible for returning the facility to compliance.

#### C. *WARNING LETTERS*

##### 1. Circumstances for Warning Letters

DEQ compliance staff use Warning Letters to notify the RP of alleged violation(s) and to secure compliance when **staff expect that the violation(s) can be corrected within 30 to 90 days**, unless the alleged violations meet the criteria for an NOV (*e.g.*, HPVs and SNCs). Specifically, Warning Letters **must** be issued for oil discharges greater than or equal to 150 gallons but less than 500 gallons, if any part of the discharge reaches the state waters,<sup>6</sup> unless an

<sup>4</sup> See Va. Code §§ [10.1-1309\(A\)\(vi\)](#) (Air); [10.1-1455\(G\)](#) (Waste); and [62.1-44.15\(8a\)](#) (Water).

<sup>5</sup> Program guidance may specify that its Informal Corrections include the statutory NOAV elements as well.

<sup>6</sup> Except: (1) releases from farm or residential tank of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes ([9 VAC 25-80-10](#)) (“UST” definition); (2) releases from tanks used for storing heating oil for consumption on the premises where stored (*Id.*); (3) discharges from aboveground storage tanks with a capacity of 5,000 gallons or less containing heating oil for consumption on the premises where stored (Va. Code [§ 62.1-44.34:17\(E\)](#)). Warning Letters for Article 11 oil releases or discharges described in (1) through (3), in the amounts specified **may** be issued but are not mandatory. State Water Control Law prohibits discharges to any waters of the Commonwealth. The guidance is intended to be applied to discharges primarily to surface waters. If the discharge of oil is to ground water, RO staff should consult the program office and DE regarding the proper course to follow.

[NOV](#) is appropriate. If the RP completes and documents a satisfactory and durable return to compliance within the time allowed, the case can be closed without further action.

## 2. Elements of Warning Letters

The elements of a Warning Letter are listed below:

- A named RP verified through the State Corporation Commission (SCC), land records, or other appropriate means. The name may or may not match the name on the permit;
- The facility or source name and its permit, registration, or pollution complaint/incident response (PC/IR) number;
- Notice that DEQ has reason to believe that the RP may be in violation of applicable laws, regulations, or permit requirements at the facility or source;
- Disclaimer that the Warning Letter is not a case decision under the APA;
- Description of the facts underlying each alleged violation (the observations) – what was seen by DEQ staff, stated by facility representatives, or reported by the facility or source. The observations should correlate with the legal requirements that follow. Observations are not speculations, opinions or conclusions. In particular, Warning Letters should not conclude that the observed or reported condition “has violated” or “is in violation of” an environmental requirement;
- The specific provision of law, regulation, permit condition, order or enforceable certification that has been allegedly violated (the legal requirements). This includes a **citation to the requirement** and a **concise quotation of the applicable portion of the requirement (not paraphrased)**, both in bold font. Legal requirements are set out adjacent to the related observations;<sup>7</sup>
- Statement of the enforcement authority and options available to DEQ;
- Statement of future actions and a request that the **RP respond within 20 days of the date of the Warning Letter**, detailing the corrective action it has or will take;<sup>8</sup>
- Request that the RP advise of disputed observations or other pertinent information;
- The process for obtaining a case decision or fact finding on whether or not a violation has occurred, including the [Process for Early Dispute Resolution](#) (PEDR); and
- DEQ contact information.

## 3. Model Warning Letters

Model Warning Letters for UST, Oil Discharge, and Solid Waste violations are attached (Attachments [2-2A](#), [2-2B](#), and [2-2C](#)). These demonstrate how various types of information can be presented (*e.g.*, on-site observations, data sets, facility reports). [Attachment 2-2D](#) has standard Warning Letter paragraphs with references to authorities for each media program.

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<sup>7</sup> The legal requirements, including citations, are labeled separately from the observations and set in **bold font** to make clear that both observations and legal requirements are included, that they are separately identified for each alleged violation, and that a specific provision has been cited for each legal requirement.

<sup>8</sup> The authority to require production of information is provided by separate authority, so a Warning Letter by itself is not an information request. See Va. Code §§ [10.1-1314](#) (Air); [62.1-44.21](#) (Water); [42 USC § 6927\(a\)](#) (Hazardous Waste); Va. Code [§ 10.1-1402\(6\)](#) (Solid Waste). See also Chapter 8.

#### **4. Process for Warning Letters**

DEQ staff provide the Warning Letter in a timely manner to the RP for the facility – **preferably within 30 days of discovery of the alleged violation unless program guidance provides for a different time.** Any DEQ staff with written authorization from his or her Regional Director (RD) or Division Director (DD) (including as a job duty in an approved Employee Work Profile (EWP)) can sign a Warning Letter. Warning Letters request that the RP verify the corrective action or provide a plan and schedule for returning to compliance.<sup>9</sup> A meeting may be necessary. If the RP's proposal is acceptable:

- No further action memorializing the plan and schedule need be undertaken if the return to compliance will take **90 days or less from the date of the letter.**
- If the return to compliance will take **more than 90 days but under 12 months**, then a compliance agreement (*see* [Letters of Agreement](#)) may be appropriate.
- If the return to compliance will take **longer than 12 months**, or if a compliance agreement is not appropriate, then a [Consent Order](#) must be used to memorialize the plan and schedule. Note: consent orders preceded only by a Warning Letter do not impose a civil charge. If a civil charge is appropriate, an NOV should be issued.

Where available, staff may attach materials that support the Warning Letter and help the RP understand the alleged violations. These materials can include inspection reports, photographs, maps, and copies of relevant regulations or laws.

After issuing a Warning Letter, staff track and follow-up on any actions required to ensure a return to compliance. Staff should check every deadline within 30 days of the deadline or as directed in program guidance. To confirm the RP has returned to compliance, staff may obtain written or electronic confirmation from the RP, conduct a follow-up site visit, or both. Staff document all correspondence and follow-up site visits in the file and the relevant database.

#### **5. Additional Warning Letters**

DEQ compliance staff issue additional Warning Letters for alleged violations found during subsequent inspections, site visits and/or record reviews, unless the alleged violations demonstrate conditions to support an [NOV](#) or program policy requires otherwise. Staff in the Water Program issue additional Warning Letters for each additional full point in the Compliance Auditing System (CAS) unless an NOV is appropriate.

#### **6. Challenges and Corrections to Warning Letters**

Challenges and corrections to Warning Letter are handled like those for [NOVs](#).

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<sup>9</sup> Warning Letters and NOVs should state a date by which the regulated party is to respond, and avoid stating new, dates for compliance, which might be seen as authorizing noncompliance until that date.

## 7. Subsequent Actions

If the RP agrees to, completes, and documents a satisfactory and durable return to compliance, staff should send an acknowledgement (*see* [Attachment 2-3](#)) and close the matter. If the RP **fails to adequately respond to the Warning Letter within 30 days or fails to return to compliance within 90 days**, staff should promptly issue an NOV and refer the case for enforcement action, or take other action as specified in program guidance.

If an RP cannot meet a date in its plan to return to compliance, the RP should notify DEQ immediately and provide documentation why it is unable to do so. DEQ may extend the date for RP action for good cause if the RP has notified the DEQ as soon as those circumstances became apparent. Extensions must be documented to the file and may require an LOA or consent order. The extension should clearly state that it does not relieve the RP from its obligation to comply with applicable environmental requirements. If an RP misses a deadline without good cause or fails to notify DEQ, staff should promptly issue an NOV and refer the case for enforcement action, unless program guidance requires a different action.

### ***D. NOTICES OF VIOLATION (NOVs)***

DEQ staff use NOVs to notify the RP of alleged violation(s) and to signify that the alleged noncompliance is ongoing, persistent, severe, or of such significance that the case is appropriate for further enforcement action and may warrant a civil charge or civil penalty.<sup>10</sup> NOVs mark the transition from compliance to enforcement. If the alleged violations are confirmed, DEQ usually resolves NOVs by [Consent Order](#), [Executive Compliance Agreement](#) (ECA), or other formal enforcement tool. NOVs request the RP to contact DEQ **within 10 days** to discuss the alleged violations, the steps necessary to return to compliance, a prompt meeting date, and possible future enforcement actions.

#### **1. Circumstances for NOVs**

Typical circumstances warranting NOVs include, but are not limited to:

- Alleged violations that present an imminent and substantial hazard to human health or the environment (consider an [Emergency Order](#) or [Court Action](#), and statutory notice to the local government of the alleged violation;<sup>11</sup>
- Alleged violations that have demonstrated, substantial adverse impacts to human health or the environment, or have substantial potential for such impacts;
- Significant alleged violation of an essential program element, *e.g.*, no permit;
- Alleged violations of [Consent Orders](#), [APA Orders](#), or [Court Orders or Decrees](#);
- Priority noncompliance, including HPVs (Air), SNCs (Hazardous Waste and Water VPDES), and Severity Level III violations (Solid Waste);
- Alleged violations that staff expect to take more than 90 days to return to compliance;

<sup>10</sup> The Virginia Code does not define civil charges or civil penalties. The authorizing statute identifies which term to use. In general, civil charges are assessed with the consent of the RP in administrative actions, while civil penalties are assessed in adversarial administrative actions or judicial actions.

<sup>11</sup> See Va. Code §§ [10.1-1310.1](#) (Air), [10.1-1407.1](#) (Waste), and [62.1-44.15:4\(A\)](#) (Water).

- Ongoing or persistent noncompliance, including repeated or continuing alleged violations by the RP despite previous compliance activity or informal actions;
- Seasonal violations that need quick elevation when consistent with program guidance;
- Emissions violations in the Air Program;
- In the Water Program, when four points are accrued based on the point assessment criteria in the CAS, or when cumulative violations of program requirements, not necessarily repeated or continuing, for a single parameter or type that trigger action;
- Discharge of oil of 500 gallons or more, if any portion reaches state waters;<sup>12</sup>
- Discharge of oil, regardless of the amount of the discharge and whether or not the discharge reaches state waters, if:
  - the discharge is the result of willful or grossly negligent action(s);
  - the discharge is part of a pattern of chronic behavior;
  - the discharge impairs any beneficial uses;
  - the responsible party refuses to clean up the discharge; or
  - the discharge adversely impacts human health;
- Failure to report significant violations where such reporting is required;
- Failure to pay civil charges or required fees or costs, where collection procedures have been unsuccessful;
- Failure to take timely and appropriate required action in response to a spill or other release to the environment;
- Alleged falsification of certifications, reports, or other documents submitted to DEQ, and alleged violations that appear to include gross negligence and/or that appear to be knowing or willful (consider notifying of possible criminal activity); or
- Other noncompliance as identified in program guidance.

## 2. Elements of NOVs

The elements of an NOV are listed below:

- A named RP verified through the SCC, land records or other appropriate means. The name may or may not match the name on the permit;
- The facility or source name and its permit, registration, or PC/IR number;
- Notice that DEQ has reason to believe that the RP may be in violation of applicable laws, regulations, or permit requirements at the facility or source;
- Disclaimer that the NOV is not a case decision under the APA;
- Description of the facts underlying each alleged violation (the observations) – what was seen by DEQ staff, stated by facility representatives, or reported by the facility or source. Observations should correlate with the legal requirements that follow. Observations are not speculations, opinions or conclusions. In particular, NOV's should not conclude that the observed or reported condition “has violated” or “is in violation of” an environmental requirement;

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<sup>12</sup> This **mandatory** NOV for discharge of oil is subject to the same exceptions as in footnote 6 on page 2-3. NOV's for Article 11 oil releases or discharges described in (1) through (3) of the footnote in the amounts specified here **may** be issued but are not mandatory. The same statements regarding discharges to surface water and ground water apply.

- The specific provision of law, regulation, permit condition, order or enforceable certification that has been allegedly violated (the legal requirement). This includes a citation to the requirement and a **concise quotation of the applicable portion of the requirement (not paraphrased)**, both in bold font. Legal requirements are set out adjacent to the related observations;<sup>13</sup>
- Statement of enforcement authority and enforcement options available to DEQ;
- Statement of future actions and a statement that the RP may be asked to enter into a consent order with civil charges;
- Request that the **RP contact DEQ with 10 days** to set up a prompt meeting;<sup>14</sup>
- Request that the RP advise of disputed observations or other pertinent information;
- A statement of the process for obtaining a final decision or fact finding on whether or not a violation has occurred, including the [PEDR](#); and
- DEQ contact information. The contact for an NOV is the DEQ staff member who will be responsible for the enforcement case.

### 3. Model NOVs

Model NOVs for Air, Solid Waste, Water DMR, and Oil Discharge, respectively, are attached (Attachments [2-4A](#), [2-4B](#), [2-4C](#), and [2-4D](#)). These demonstrate how various types of information can be presented (*e.g.*, on-site observations, data sets, facility reports). [Attachment 2-4E](#) has standard NOV paragraphs with references to authorities for each media program.

### 4. Process for NOVs

DEQ provides NOVs in a timely manner to the RP – **within 30 days of discovery of the alleged violation unless program guidance provides a different time**. Any DEQ staff with written authorization from his or her RD or DD (including as a job duty in an approved EWP) can sign an NOV. NOVs request that the RP respond within 10 days to set up a prompt meeting. **The meeting with the RP should take place within 30 days of the date of the NOV.** Compliance, enforcement and (as needed) permitting and program staff should consult in drafting the NOV to help ensure that the NOV provides a sound basis for further action. In unusual circumstances, the RO should also consult DE when preparing an NOV:

- If the case is unique or sensitive;
- If there have been serious or significant environmental or regulatory impacts (*e.g.*, HPV or SNC);
- If the injunctive relief is expected to be expensive;
- If the civil charge (gravity or economic benefit) is expected to be large; or
- If there is a significant history of non-compliance.

<sup>13</sup> The legal requirements, including citations, are labeled separately from the observations and set in **bold font** to make clear that both observations and legal requirements are included, that they are separately identified for each alleged violation, and that a specific provision has been cited for each legal requirement.

<sup>14</sup> The authority to require production of information is separate from the authority for NOVs, so an NOV by itself is not an information request. Va. Code §§ [10.1-1314](#) (Air); [62.1-44.21](#) (Water); [42 USC § 6927\(a\)](#) (Hazardous Waste); Va. Code [§ 10.1-1402\(6\)](#) (Solid Waste). See Chapter 8.

Where available, staff may attach materials that support the NOV and help the RP understand the alleged violations. These materials can include inspection reports, photographs, maps, and copies of relevant regulations or laws. If the RP has already returned to compliance and the order is for penalties only, a consent order can be prepared and sent with the NOV. In such cases, the RP should be notified in advance.

Successful delivery of NOVs is critical to ensuring that RP decision-makers are aware of the nature and significance of the alleged violations. Copies of an NOV can be sent concurrently to several persons in addition to the RP contact (*e.g.*, registered agent, Board of Supervisors) to ensure that the NOV has reached RP decision makers. DEQ staff should strategically employ delivery confirmation or delivery receipt methods when receipt of ordinary mail is uncertain. For the majority of correspondence, staff will know that first class mail has sufficed when the RP contacts them as directed in the instructions in the NOV. If **no response has been received within 30 days (or sooner as appropriate) from the date of the NOV**, or if the RP indicates it is unwilling to resolve the matter by consent, a follow-up letter enclosing a copy of the NOV should be sent with delivery confirmation or delivery receipt ([Attachment 2-6](#)). If an RP refuses delivery, other means, such as service of process or hand-delivery, may be employed.

## 5. Additional NOVs

Additional NOVs usually document continued or additional alleged violations based on subsequent inspections, reports, or other information. Such NOVs may also be issued to reinforce the violation's seriousness or the importance of a return to compliance. Program guidance usually provides standards for issuing additional NOVs. While [PEDR](#) is being utilized, DEQ continues to perform all necessary inspections and record potential violations but does not, except in cases of emergency, issue NOVs to the RP for the same or related alleged violation that is the subject of the PEDR. Since two NOVs for the same or substantially related violations at the same site are required for a formal hearing for civil penalties (*see* [Adversarial Administrative Actions](#)), the DE Adjudications Manager must be consulted when drafting subsequent NOVs in anticipation of a formal hearing.<sup>15</sup> Additional NOVs, however, are not issued where the RP has signed a proposed consent order for the same issues that is pending approval by a Board.

## 6. Challenges and Corrections to NOVs

If an RP demonstrates that a NOV is clearly erroneous in part, then a "Corrected NOV" should be sent to the RP. In the highly unusual case that an NOV is completely in error, then a letter rescinding the NOV should be sent ([Attachment 2-7](#)).<sup>16</sup> Though NOVs are not case decisions, they represent DEQ staff's view of facility conditions and are frequently reported to EPA and the public. NOVs are specifically *not exempt* from production under the Virginia Freedom of Information Act (FOIA) as a DEQ enforcement strategy document.<sup>17</sup> If DEQ staff and the RP disagree about observations or legal requirements, the RP can elevate the issue.

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<sup>15</sup> After DE has accepted a referral in a Water VPDES case, the Adjudications Manager will notify the RO Compliance Auditor and CO Water Division. The Compliance Auditor need only notify the Adjudications Manager of subsequent, pending NOVs in the case and provide a copy to the Adjudications Manager once they are issued.

<sup>16</sup> NOV correction or rescission is very unusual, and is only appropriate when the NOV as issued was wrong – it is not to be used as a negotiation tool or where there are genuine disagreements as to interpretation of facts or law.

<sup>17</sup> Va. Code [§ 2.2-3705.7\(16\)](#). Staff should confirm whether another exemption applies before releasing.

## 7. Subsequent Actions

Ordinarily, a case is [referred](#) to enforcement with the NOV. If the NOV is not successfully challenged, enforcement staff usually begin work on an [ERP](#) and a [Consent Order](#). If the NOV is successfully challenged or if for other appropriate, documented reasons no order or further DEQ action is warranted, the case should be closed (*see* [Case Closures](#)).

### ***E. PROCESS FOR EARLY DISPUTE RESOLUTION (PEDR)***

As required by Act of Assembly (Act),<sup>18</sup> the Director has issued a [Process for Early Dispute Resolution of Notices of Alleged Violation and Notices of Deficiency](#) to help identify and resolve disagreements regarding compliance with the environmental requirements and any related guidance. The process is optional and is initiated at the RP's request after the issuance of "for example, inspection reports where a violation is alleged, Warning Letters or [NOVs]" or other notice of deficiency.<sup>19</sup> The Act requires that "information on the [PEDR] shall be provided to ... facilities potentially impacted by the provisions of this [A]ct." The steps in PEDR include:

1. The RP submits written information to the RD and the appropriate DD detailing the facts, the applicable rules, the information supporting its position, the steps taken to resolve the issue with DEQ staff, and asking for assistance in resolving the issue.
2. The RD and appropriate DD determine the best way to proceed, and one of them provides a written response to the RP detailing the plan for evaluating the claim.
3. Upon completing the evaluation, the RD and DD notify the RP of DEQ's decision to affirm, amend or retract the notification and the basis for that determination. The RD and DD also provide guidance to staff.

As a condition to utilizing the PEDR, the RP and DEQ acknowledge that the resolution of a dispute provided through PEDR is not a case decision. If the RP completes the PEDR and is not satisfied, it may request in writing that DEQ take all necessary steps to issue a case decision in accordance with the APA. PEDR may not be used to resolve a dispute after the issuance of a case decision. An example letter for a PEDR resolution is included as [Attachment 2-8](#).

While PEDR is being utilized, use of NOVs is limited (*see* Section I.C.5, page 2-9). Participation in PEDR, however, does not limit in any way DEQ's ability to issue a case decision nor limit any other remedies available under law. DEQ may elect to proceed directly to an informal fact finding (IFF) or a formal hearing pursuant to the APA in lieu of processing a PEDR.<sup>20</sup>

<sup>18</sup> [2005 Acts c. 706](#). The requirement for PEDR is found in clause 2 at the end of the Act. It is not codified.

<sup>19</sup> The PEDR guidance defines notice of deficiency as "a written notice to a person informing them that they appear not to have met or completed the requirements for obtaining a right or benefit, for example, a permit."

<sup>20</sup> Under Va. Code [§ 10.1-1186.3\(A\)](#), the citizens' boards have promulgated regulations for mediation and alternative dispute resolution related to regulatory development and permit issuance. The statute and regulations do not address enforcement. *See* 9 VAC [5-210-40](#) (Air); 9 VAC [20-15-40](#) (Waste); and 9 VAC [25-15-40](#) (Water). Employing mediation or dispute resolution is discretionary and not judicially reviewable. Va. Code [§ 10.1-1186.3\(B\)](#).

## **II. ENFORCEMENT REFERRALS AND PLANS**

### **A. REFERRAL FOR ENFORCEMENT ACTION**

An NOV implies that further enforcement action will follow. By naming as the contact the DEQ staff responsible for the enforcement case, the NOV acts to refer the matter for enforcement action. A short referral form that provides additional, basic information may be used at the option of the RO ([Attachment 2-9](#)). On referral, enforcement staff have the burden of going forward with the case, evaluating and acting on it, and apprising compliance staff of case status. In turn, compliance staff support the enforcement case, continue compliance activities (unless otherwise agreed), and keep enforcement staff apprised of facility or source status. If the NOV is the referral, a copy of it is entered into the Enterprise Content Management system (ECM) in the enforcement retention schedule (ECM 123-1).

### **B. ENFORCEMENT RECOMMENDATION AND PLAN (ERP)**

In an ERP, enforcement staff recommend a plan for DEQ to resolve a referred case and provide a reasoned analysis for the recommendation. Once approved by the RD or DRD, the ERP is an agency plan for the case and authorizes enforcement staff to proceed under its terms.

Preparing an ERP for an LOA is optional (and LOA ERPs can be abbreviated). Otherwise, enforcement staff prepare ERPs for all referred cases, except when closing a case directly by [Case Closure](#). ERPs should be brief, concise, and factual. In the ERP inspectors are identified by name, unless already identified in the referral. The ERP must:

- Identify the facility or source and its location;
- State whether the facility is in the [Virginia Environmental Excellence Program](#) (VEEP) and if so at what level.<sup>21</sup>
- Identify the RP;
- Identify the permit, registration, or PC/IR number;
- Identify the media program;
- State whether the facility is HPV or SNC;
- Identify any state waters affected;
- Cite the applicable legal requirements and describe the alleged violations;<sup>22</sup>
- Provide a case summary, including the relevant NOVs and Warning Letters;
- Where appropriate, attach the civil charge worksheet(s), and discuss civil charge or civil penalty line items (in the text or on the worksheet(s)), including the economic benefit of noncompliance;
- Recommend a preferred course of action; and
- Where appropriate, attach a completed Supplemental Environmental Project (SEP) Analysis Addendum ([Attachment 2-10](#)) with a recommendation regarding the SEP (consult Pollution Prevention staff for Environmental Management System SEPs).

<sup>21</sup> A person or facility must have a “record of sustained compliance” for VEEP membership. See Va. Code §§ [10.1-1187.1](#); [-1187.3](#).

<sup>22</sup> In ERPs, the alleged violations should be described briefly; the full legal requirements need not be set out.

Model ERPs are attached in both standard and table format (Attachments [2-11A](#), [2-11B](#)). An ERP may authorize a civil charge range, including up to a 30% reduction for documented reasons. DE and RO staff must concur on the ERP. The Regional Enforcement Manager (REM), the DRD, and in most ROs, the RD reviews and approves or require changes to the ERP. Changes to essential elements of the ERP are confirmed with DE, usually by telephone or email.

During the negotiations, staff may also find that the ERP requires changes. If needed, an initialed notation to the ERP or an ERP Addendum ([Attachment 2-12](#)) should be prepared to conform to the final document. Civil charge reductions of 30% or less of the gravity-based amount are documented using the Addendum or a Civil Charge/Civil Penalty Adjustment Form (from Chapter 4), but do not need DE concurrence. DE and the RO, however, must concur on other significant changes to essential elements of an ERP (*see* [DE and Regional Concurrence](#)).

As a DEQ enforcement strategy document, an ERP is exempt from disclosure under FOIA until after a proposed sanction resulting from the investigation has been proposed to the Director of the agency (*i.e.*, public notice of Water or Waste orders or presentation for DEQ execution of Air orders). *See* Va. Code [§ 2.2-3705.7\(16\)](#); *DEQ Virginia Freedom of Information Act Compliance* at Attachment E (on the [TownHall website](#) under Agency-level guidance).

### III. ENFORCEMENT PROCEDURES BY CONSENT

#### A. LETTERS OF AGREEMENT (LOAs)

An LOA is an informal enforcement tool that represents an agreement between the RP and the RO following an [NOV](#) to return the RP to compliance within 12 months.<sup>23</sup> LOAs are available only in limited circumstances (see below). Although DEQ has authority to enter into agreements (*see* Va. Code [§ 10.1-1186\(2\)](#)), LOAs are not explicitly recognized in the Va. Code and do not establish independent environmental requirements. An LOA does, however, provide a clear record that the RP understands its responsibilities. LOAs must cite the alleged violations and include a schedule to return to compliance by a date certain. Before issuing an LOA, DEQ staff may prepare an abbreviated ERP. Usually, the RD, DRD, or REM signs the LOA. An LOA is not a case decision or determination that violations have occurred, and civil charges cannot be assessed in LOAs. LOAs do not discharge liability for alleged violations and cannot be used as a defense to federal or state enforcement action or to a citizens' suit.

##### 1. Circumstances for LOAs

DEQ uses LOAs for corrective measures that **take 12 months or less to implement**. DEQ does not use LOAs for:

- Priority noncompliance, including HPVs (Air), SNCs (Hazardous Waste and Water VPDES), and Severity Level III violations (Solid Waste);

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<sup>23</sup> Following [Warning Letters](#), DEQ staff may also issue "compliance agreements" (*e.g.*, Tank Compliance Agreements), which are similar to LOAs but are often signed by staff rather than by the RD, DRD, or REM. Because they are used primarily by compliance staff, such agreements are not discussed in this chapter.

- Setting interim effluent limits (Water) or emissions limits (Air);
- Repeat offenders (not a previously corrected violation at the facility or source ; no previous violations at the facility or source in the last 12 months);
- Allegedly operating without a permit or pending permit issuance; or
- Alleged violations of RCRA Subtitle C requirements.

## **2. Elements of LOAs; Model LOA**

LOAs include the governing statute, the background of the case, the agreed actions and schedule to return to compliance, and signatures. The agreed actions are numbered, and except for the 12-month limitation, the actions are similar to those in the schedule of compliance of a consent order. Since LOAs are not case decisions or determinations, it is not strictly necessary to make a finding of one or more violations in an LOA. LOAs are not subject to public notice. They are effective from the date of RP signature. One original LOA is prepared, unless the RP requests a second original for its records. A model LOA is attached ([Attachment 2-13](#)). The model LOA must be followed, and any questions should be directed to DE staff.

## **3. Monitoring and Terminating LOAs**

LOAs are monitored for compliance as any other agreement or order. See [Monitoring Compliance with Orders and Agreements](#). If the RP satisfactorily completes the LOA, staff acknowledge the completion ([Attachment 2-14](#)), and the case is closed (*see* [Case Closure](#)). If the RP fails to comply with an LOA, enforcement staff prepare a new or amended ERP and escalate to another enforcement method, usually with civil charges or penalties. A new NOV may be issued, as appropriate, citing the original and any subsequent alleged violations. Since an LOA is not separately enforceable, failure to comply with its terms is not a separate alleged violation.

### ***B. CONSENT ORDERS***

A consent order<sup>24</sup> is an administrative order issued on behalf of one or more of the citizens' Boards<sup>25</sup> to an RP, *with its consent*, that requires the RP to perform specific actions to return a facility or source to compliance with enforceable environmental requirements. Consent orders are authorized by statute,<sup>26</sup> and can be enforced in court. They may impose civil charges. DEQ uses consent orders with private entities and federal or local government agencies. For state agencies, DEQ uses Executive Compliance Agreements ([ECAs](#)). The ROs develop consent orders usually after one or more meetings with the RP, and with RO management and DE concurrence. Since the RP agrees in the order that it has received due process under the APA, a consent order is a case decision, and the violations in a consent order are no longer "alleged."

<sup>24</sup> For purposes of this chapter, the term "consent orders" includes administrative "consent special orders." Courts may issue judicial consent orders or judicial consent decrees.

<sup>25</sup> The three citizens' Boards are the State Air Pollution Control Board, the SWCB, and the Virginia Waste Management Board. In very limited circumstances, DEQ issues consent orders in its own name.

<sup>26</sup> Va. Code [§§ 10.1-1309, -1316\(C\)](#) (Air); [§ 10.1-1455\(F\)](#) (Waste); [§ 62.1-44.15\(8d\)](#) (Water and UST); [§ 62.1-44.34.20\(D\)](#) (Oil); [§ 62.1-268\(D\)](#) (Ground Water); and [§ 10.1-1197.9\(C\)\(3\)](#) (Renewable Energy).

## **1. Circumstances for Consent Orders**

DEQ uses consent orders to:

- Establish an enforceable schedule that compels an RP to return to compliance expeditiously, by requiring the RP to: (1) comply with statutes, regulations, permit conditions, orders, and enforceable certifications; (2) apply for and obtain a permit or coverage under a permit; (3) install, test, and implement new control technology; (4) comply with a schedule for facility upgrades, modifications, startups, and shakeouts; (5) perform a site assessment and clean up or remediation; (6) restore wetlands or purchase mitigation credits; or (7) perform any other action to return to compliance;
- Set interim effluent or emissions limits;
- Assess civil charges for past violations of enforceable environmental requirements, to include the recovery of economic benefit;
- Undertake and complete a SEP as proposed by the RP and approved by DEQ; and
- Recover appropriate annual fees and other costs, such as those associated with oil spill or fish kill investigations and fish replacement.<sup>27</sup>

## **2. Elements of Consent Orders**

A consent order includes the elements below, which are described more completely in the attached model consent orders. **A finding of one or more violations of an enforceable environmental requirement is essential to a consent order.**

1. *Caption and Style* – The Caption and Style includes the letterhead of the office issuing the order; the Board or Boards in whose name the order is issued; a recital that it is an “Enforcement Action – Order by Consent”; the correct RP legal name; the facility or source that is the subject of the order; and the permit or registration number, if any, or that the facility or source is unpermitted (use the PC/IR No.).
2. *Section A – Purpose* – The Purpose recites the authority of the Board to issue the order and states that the order is to resolve certain violations (not “alleged violations”) of the law, regulations, and permit conditions. If the order supersedes another order, the Purpose states that as well.
3. *Section B – Definitions* – Definitions are used to specify the references and meaning of terms used in the order. The model orders contain common definitions. Staff can modify existing definitions if necessary, or add other appropriate definitions, and should delete definitions that are not used.
4. *Section C – Findings of Fact and Conclusions of Law* – This section describes the jurisdictional, factual, and legal basis for the order. Inspectors are not referred to

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<sup>27</sup> Costs for oil spill and fish kill investigations and fish replacement can be recovered by demand letter (*i.e.*, without an order) if there is no other injunctive relief or civil charges. DEQ has a [worksheet](#) for such costs as well as separate guidance, [Fish Kill Investigation Guidance Manual](#) (on [TownHall](#) website under SWCB guidance).

by name in orders, but as “DEQ staff.” NOVs issued during the consent order process are cited in this section. **The Findings must provide a basis for each item in the Schedule of Compliance. This section must also include a Board finding or conclusion that the RP has violated one or more specific, enforceable environmental requirement.**

5. *Section D – Agreement and Order* – This section sets out what the RP agrees to and is ordered to do. It typically incorporates a “Schedule of Compliance” as Appendix A (and Appendix B, *etc.*, as needed) and orders any monetary payments that are imposed (civil charges, annual fees, permit fees, investigative costs, and fish replacement costs).<sup>28</sup> Any payment plan or SEP offset is included in this section. Putting all monetary payments into one section simplifies tracking and collecting payments as DEQ “receivables.” If the order supersedes another one, termination of the prior order is effected in this section.
6. *Section E – Administrative Provisions* – The Administrative Provisions are the “legal” provisions of the order. Alternative provisions are included in the model orders. **Any changes from the model or alternative language for these provisions must be approved through the Director of Enforcement.**
7. *Signature and Notary Statement* – The order must be signed by a current, authorized official of the RP. The type of notary statement should match the type of RP (individual, corporate, partnership, limited liability company, *etc.*).
8. *Schedule of Compliance* – The schedule details what the RP must do to return the facility or source to compliance. The schedule should include firm date commitments for beginning and completing activities wherever possible. Dates for interim milestones may be dependent on DEQ review or approval (*i.e.*, “ratchet dates”). **The goal of a Schedule of Compliance is to compel an RP to return to compliance by a date certain in all possible cases.**<sup>29</sup> Staff must be sure that all violations in the Findings section are fully accounted for; DEQ may not be able to re-address violations cited in the order at a later time. For multimedia orders, the schedule should indicate which items relate to each Board.
9. *Other Appendices* – The details of any SEP or interim effluent limits are set out in separate appendices.

### 3. Model Consent Orders

Attached are model consent orders for Air ([Attachment 2-15A](#)), Water VPDES ([Attachment 2-15B](#)), Water VPDES Stormwater ([Attachment 2-15C](#)), Water VWP ([Attachment 2-15D](#)), Water VPA ([Attachment 2-15E](#)), Water VPA General Permit ([Attachment 2-15F](#)); UST

<sup>28</sup> All moneys due DEQ can be combined into one check (payable to the Treasurer of Virginia) if the order identifies the allocation of the funds. Payments due another Department (*e.g.*, DGIF) can be combined into a separate check, if the order identifies the allocation of the funds. Checks for DGIF are made payable to DGIF.

<sup>29</sup> A date certain may not be possible with multi-year schedules of compliance, as determined case by case.

([Attachment 2-15G](#)), Oil Discharge and ASTs ([Attachment 2-15H](#)), Hazardous Waste ([Attachment 2-15I](#)), Solid Waste ([Attachment 2-15J](#)), and Ground Water Management ([Attachment 2-15K](#)). Formatting tips are in [Attachment 2-16](#). DEQ staff must use the model language when preparing and issuing all consent orders. If the models do not address a situation, RO staff should contact DE when drafting the order. RPs are invited to comment on draft orders, but DEQ, not the RP, drafts and prepares consent orders that are signed.

#### **4. Addressing Additional or Subsequent Violations**

The violations in a consent order usually match those in the referring NOV or the NOVs leading to the referral. If violations are returned to compliance before issuance of the order, this can be noted in the [ERP](#) and order. If subsequent NOVs are issued prior to substantial agreement on the order, the order is ordinarily modified to include those violations, and the civil charge is modified, as appropriate. Otherwise, the subsequent NOV should be specifically excluded from the order, to avoid the inference that the issues have been addressed. Compliance staff are usually responsible for resolving violations that are noted in an inspection report accompanying an NOV, but not cited in the NOV. The [referral](#) indicates who has responsibility. In the Water VPDES program, violations that occur within the 6-month window for accumulating four points in the CAS are included in the order.<sup>30</sup> Sometimes, an NOV will list observations for which there are stronger legal citations<sup>31</sup> not listed in the NOV or to which other environmental requirements apply. Since the RP has notice of the violations and the order is by agreement, use of the stronger citation is appropriate. Orders do not ordinarily address alleged violations where the RP has no prior actual notice or constructive knowledge (*i.e.*, knowledge that can reasonably be inferred, such as violations of permit or order conditions, emissions or discharge limits, releases or spills). Enforcement staff should review data systems and facility records or communicate with compliance managers, to identify all outstanding alleged violations with the RP. Enforcement staff, however, should not attempt to resolve violations in other media programs without an enforcement referral from that program.

#### **5. Civil Charges**

Consent orders may impose civil charges pursuant to the criteria in Chapter 4. If the RP voluntarily self-discloses certain violations, there may be a statutory immunity against civil charges or penalties for those violations, or mitigation based on the self-disclosure, as described in Va. Code [§ 10.1-1198](#) and [-1199](#) and Chapter 5. Consent orders preceded only by a Warning Letter do not impose civil charges. In its consent orders, DEQ does not suspend civil charges, stipulate civil charges for future violations, or charge interest. Civil charges must include the economic benefit of noncompliance where it can be reasonably calculated.<sup>32</sup> DEQ does allow

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<sup>30</sup> No civil charge is assessed for Warning Letter violations that were completely resolved in response to the letter.

<sup>31</sup> Statutes are the strongest authority, followed in order by court orders or decrees, permit conditions, administrative consent or adversarial orders, regulations, and enforceable certifications. Guidance documents do not have the force of law, but are used to provide a reasonable and consistent construction of law or other environmental requirement.

<sup>32</sup> The General Assembly stated in [1997 Acts c. 924, paragraph L.4](#): "It is the intent of the General Assembly that the [DEQ] recover the economic benefit of noncompliance in the negotiation and assessment of civil charges and penalties in every case in which there is an economic benefit from noncompliance, and the economic benefit can be reasonably calculated."

payment of civil charges in installments when necessary, based on case-specific circumstances. Payments should be made at least quarterly and should be limited to three-year terms.

## **6. Supplemental Environmental Projects (SEPs)**

SEPs are environmentally beneficial projects not otherwise required by law that an RP agrees to undertake in a consent order in partial settlement of an enforcement action. *See* Va. Code [§ 10.1-1186.2](#). The procedures for analyzing and approving SEPs are in Chapter 5. The model orders have language for incorporating SEPs in Section D and language for SEP appendices. Any decision whether or not to agree to a SEP is within the sole discretion of the applicable board, official, or court and is not subject to appeal (*see* [Attachment 2-10](#)).

## **7. Preparing Draft Consent Orders; Negotiation**

Negotiating an agreement with an RP involves a thorough analysis of DEQ's and the RP's interests, as well as both parties' alternatives to a negotiated resolution. Preparing a draft consent order for presentation to the RP includes: (1) reviewing the NOV or Warning Letters and the approved ERP; (2) verifying the RP identity and name with the [SCC](#), in the land records, or otherwise as appropriate; (3) checking databases or with compliance staff for open violations (especially in the media program in question); (4) checking the DEQ facility or source files for additional, relevant information; (5) preparing a draft using a model consent order; and (6) circulating for comment and concurrence. These steps will help assure that the draft orders are both complete and current.

If the RP has returned to compliance and the order is for penalties only, a consent order can be prepared and sent with the NOV. The RP should be notified in advance. If the RP declines to participate in negotiations, DEQ should send a letter informing the RP of possible future actions and proceed with the case (*see* [Attachment 2-6](#)).

## **8. CO Consent Orders**

Most consent orders are negotiated by the ROs. In some cases, however, CO staff negotiate directly with the RP, and the DE Director signs the order. These cases are identified individually, either by agreement with the RO or by direction of DEQ management. In such cases, CO staff keep the RO informed of case status, and RO staff support the case. A model referral to CO is attached ([Attachment 2-17](#)). Once executed, the original order is retained at CO, and CO staff put their original documents in ECM. The case file is then returned to the RO.

## **9. RP Agreement and Signature**

After preparing a draft consent order in accordance with the ERP and following RO management and DE concurrence, DEQ staff send the draft order to the RP for review and comment ([Attachment 2-18](#)). Staff consider the RP's comments and, where appropriate, incorporate them into the draft order. Where the RP makes substantive comments, staff may hold a meeting or use other means to resolve differences. DEQ and the RP must agree to all of the terms of the consent order before it is sent for signature ([Attachment 2-19](#)). One original

order is prepared, unless the RP requests a second original order for its records. The RP signs first and returns the document to DEQ. It is then a “proposed order.”

### 10. Public Notice and Comment

After RP signature, DEQ must provide at least 30 days’ public notice and comment on proposed Waste and Water orders, and obtain SWCB approval for proposed Water orders. Air orders do not require public notice or comment.<sup>33</sup> The table below sets out notice requirements. DEQ pays for public notice. By DEQ policy, all Water orders are given the same public notice.

Media Program	Va. <i>Register</i>	Local newspaper of general circ.	DEQ Webpage	Notice to local gov’t <a href="#">§ 62.1-44.15:4(E)</a>
Air	No	No	No	No
VPDES ( <a href="#">9 VAC 25-31-910(B)(3)</a> )	Yes	Yes	Yes	Yes
VPA ( <a href="#">9 VAC 25-32-280(B)(3)</a> )	Yes	Yes	Yes	Yes
VWP	Yes	Yes	Yes	Yes
UST	Yes	Yes	Yes	Yes
Oil and AST	Yes	Yes	Yes	Yes
GWM Act	Yes	Yes	Yes	No
AFO and Poultry (VPDES or VPA)	Yes	Yes	Yes	Yes
Solid Waste ( <a href="#">9 VAC 20-81-70(D)</a> )	No	No	Yes	No
Hazardous Waste ( <a href="#">9 VAC 20-60-70(F)</a> )	No	Yes	Yes	No

A public notice template for the [Virginia Register](#) and newspapers is attached ([Attachment 2-20](#)). A sample transmittal letter to the *Register* is also attached ([Attachment 2-21](#)). Notices can be submitted to the *Register* by email at [VaRegs@ldls.virginia.gov](mailto:VaRegs@ldls.virginia.gov). The email should include a request for confirmation of receipt. The *Register* takes at least 19 days to process the notice (its publication deadlines and schedules are provided in each issue and are online). For newspaper notice, a *Directory of Virginia Newspapers* may be obtained from the [Virginia Press Association](#), 11529 Nuckols Road, Glen Allen, VA 23059 [(804) 521-7570]. At the same time as *Register* and/or newspaper notice, RO staff send a scanned copy of the public notice and proposed Waste and Water orders to DE staff to post on the DEQ website. A cover letter to local government concerning a Water order may be used and is included as [Attachment 2-22](#).

If public comments are received, they should be summarized with the agency response. An optional spreadsheet is provided ([Attachment 2-23](#)). If the order requires substantial changes, DE and the Office of Regulatory and Public Affairs (ORPA) should be consulted about whether a second comment period is necessary. The comment-response document is prepared before the order is signed (Waste) or before the SWCB meeting (Water). Copies may be sent to the RP and to commenters (or posted to the website if there are numerous commenters).

<sup>33</sup>The DEQ enforcement strategy exemption from FOIA ends when the consent order is approved for public notice (Water or Waste) or is presented for proposed execution (Air). See Va. Code [§ 2.2-3705.7\(16\)](#); *DEQ Virginia Freedom of Information Act Compliance* at Attachment E (on [TownHall](#) website under DEQ guidance). Unless another FOIA exemption applies, the file should be scanned or loaded into ECM in accordance with policy (including quality assurance), and the signed original order is sent to the DE for filing. See Va. Code [§ 2.2-4023](#).

## **11. SWCB Approval of Water Law Consent Orders**

DEQ must obtain the SWCB approval of all consent orders issued under Water Law (Va. Code Title 62.1) prior to execution. The SWCB meets at least four times per year. Regional staff submit all Water orders and agenda item summaries to DE for review using an agenda item template ([Attachment 2-24](#)). These are then forwarded to ORPA, which includes the orders in SWCB agenda review materials and briefing books. At the SWCB meeting, the DE Water Enforcement Manager, or designated DEQ staff, presents the consent orders to the SWCB and responds to questions. After each presentation, the DE Water Enforcement Manager, or designated DEQ staff, recommends that the Board approve the order, that the Board authorize the DEQ's Director to execute the order on the Board's behalf, and further that the Board authorize the Director to refer violations of the order to the OAG for appropriate legal action. The SWCB may decide to approve, modify, or disapprove the order. Any modifications must be agreed to by the RP. If the modifications are substantial, new public notice may be necessary.

## **12. Execution by DEQ**

Air orders can be executed by DEQ immediately after the RP's signature. After considering public comment on proposed Waste and Water orders, and following SWCB approval of Water orders, the RD<sup>34</sup> executes the original order (or original orders) on behalf of the Board as delegated by the Director. The order becomes effective upon DEQ signature.

RO staff immediately send a complete copy (or the second original) to the RP for implementation ([Attachment 2-25](#)). The original signed order is sent to DE (*see* Va. Code [§ 2.2-4023](#)). Copies (or definitive data to locate the order in ECM) are immediately sent:

- for Air orders, to the Office of Air Inspections Coordination (if HPV);
- if the order requires monetary payments to DEQ, to the Office of Financial Management (OFM); and
- if the order affects the RP's financial assurance, to the Office of Financial Assurance.

## **13. Collecting Civil Charges**

DEQ specifies in all consent orders that the payment check include the RP's Federal Identification Number (unless the FIN is also the RP's social security number) and a notation that it is for payment of a civil charge pursuant to the consent order. The consent order states that the DEQ civil charge payment is to be made out to the Treasurer of Virginia and sent to:

Receipts Control  
Department of Environmental Quality  
PO Box 1104  
Richmond, VA 23218

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<sup>34</sup> In those limited cases negotiated by DE staff, the Director of DE signs the consent order.

The consent order must also state whether the funds are to be deposited in the Virginia Environmental Emergency Response Fund (VEERF), Va. Code [§ 10.1-2500](#) *et seq.*, or in the Virginia Underground Petroleum Storage Tank Fund (VPSTF), Va. Code [§ 62.1-44.34:11](#). Civil charges and penalties collected under Articles 9, 10, and 11 of State Water Control Law are deposited to VPSTF. Other civil charges and penalties are deposited to VEERF.

The Commonwealth Accounts Payable Procedures (CAPP) Manual governs the management of accounts payable and receivable for state agencies. When a consent order is executed, the civil charge becomes an account receivable and is the responsibility of OFM. OFM uses its copy of the executed consent order to initiate CAPP tracking procedures. OFM copies the RO on all letters requesting payment and keeps the RO informed when the civil charge is paid.

If the charge or fee is not paid on time, DEQ follows the Virginia Debt Collection Act, Va. Code [§ 2.2-4800](#) *et seq.* OFM is responsible for administering debt collection procedures in accordance with the Act. If there is a payment plan, the entire civil charge is accelerated, as stated in the order. If civil charges are not paid, final orders may be recorded, enforced and satisfied as orders or decrees of a circuit court upon certification of the order by the Director or his designee. Va. Code [§ 2.2-4023](#). DE undertakes recording DEQ orders. Failure to pay a civil charge is cause for a separate [NOV](#), if collection efforts by OFM have been unsuccessful.

#### **14. Amended and Superseding Consent Orders**

After a consent order is executed, subsequent events may require modifying or supplementing its terms, either through an amended or a superseding order. An amended order modifies or supplements the existing order, but leaves the rest of the order intact. A superseding order replaces the previous order in its entirety and terminates it. Whether amending or superseding an existing order, a new or amended [ERP](#) must be prepared.

Whether to amend or supersede a consent order depends on the extent of the changes. Amended orders are used for less extensive changes. Amendments are often employed:

- To modify, supplement, or supersede a schedule of compliance in an existing order (*e.g.*, to extend deadlines or integrate new requirements);
- To resolve violations of the existing order or independent violations found while the order is in effect; and
- To pay civil charges for such violations.<sup>35</sup>

Because amendments are read together with the existing order, amended orders omit sections that would be redundant, usually “Section B: Definitions” and “Section E: Administrative Provisions.” In the amendment, Section B is renamed “Basis for Amendment.” If further definitions are necessary, staff may reinsert a Definitions section and renumber the sections in the rest of the amendment. Both the amended and existing order must be read carefully to ensure that their terms do not conflict. A model amended order is attached ([Attachment 2-26](#)).

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<sup>35</sup> Amended and superseding orders should not be used to reduce or abate a civil charge after an order has been executed based on inability to pay. Inability to pay should be claimed before an RP agrees to a civil charge.

Superseding orders are used to replace the existing order entirely. For example when a new NOV is issued to an RP with an existing order, the superseding order may address the new violations and any uncompleted requirements from the old one. Because superseding orders stand on their own, the format is the same as for any consent order. Superseding orders are modified in “Section A: Purpose” and “Section D: Agreement and Order” to state that orders supersede and terminate the existing order; language is linked in the model orders.

Amended and superseding orders in the Waste and Water programs require public notice and approval as other orders. They are entered as separate orders in DEQ and EPA reports.

### **15. Monitoring and Terminating Consent Orders**

Consent orders are monitored for compliance as any other agreement or order. *See [Monitoring Compliance with Orders and Agreements](#).*

On behalf of a Board, DEQ may terminate a consent order after the RP has fully complied with its terms. The RO must document that all of the requirements of the order (including any payments) have been fully completed. The RD then signs a letter to the RP terminating the order ([Attachment 2-27](#)).<sup>36</sup> If the order has been fully complied with, but has not yet been terminated, the RP can petition DEQ to terminate the consent order. Finally, the Director can terminate the order in his or her discretion upon 30-day’s notice to the RP. RO staff notify DE when an order is terminated so that the DEQ website can be updated. When a consent order is terminated by completion of its terms, the enforcement case is closed (*see [Case Closure](#)*).

#### ***C. EXECUTIVE COMPLIANCE AGREEMENTS (ECAs)***

DEQ enforces against state agencies as against all other RPs. Instead of consent orders, however, DEQ issues ECAs to state agencies. DEQ follows the procedures for consent orders in drafting ECAs, except that DEQ cannot assess civil charges in ECAs or enforce them in court.

A model ECA is attached ([Attachment 2-29](#)). The model should be used for all ECAs. ECAs are not divided into sections, and, except for the appendix, the paragraphs are usually not numbered. Since ECAs are counterpart to consent orders, the ECA should recite a finding or one or more violations. The injunctive relief in an ECA appendix is the same as that in a consent order. If the model does not address a particular situation, RO staff should contact DE.

#### ***D. DE AND REGIONAL CONCURRENCE***

The general roles of DE and RO enforcement are in Chapter 1. Enforcement documents are the product of DEQ, not of one individual or one office. Both ROs and DE are essential for the efficient production of professional documents that are factually correct, legally enforceable, and consistent, both internally and statewide. DEQ enforcement is regionalized, and most

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<sup>36</sup> Formerly, orders required 30-day notice before termination, even if there was a full return to compliance. A modified letter may be required, depending on the wording of administrative provision no. 11 ([Attachment 2-28](#)).

enforcement occurs in the DEQ ROs. DE coordinates statewide implementation of the enforcement program and assures consistency in approach, injunctive relief and civil charges.

In most cases, RO staff draft enforcement documents, and specific documents are reviewed by DE. RO staff at least “peer review” documents before sending them to DE. DE concurrence is required for

- ERPs, civil charge worksheets, and SEP Analysis Addenda (and substantive amendments);
- Draft consent orders and ECAs;<sup>37</sup>
- Cases proposing civil charge mitigation greater than 30% of the gravity-based charge or mitigation for self-disclosed violations;
- Case closure memoranda where there is not a full return to compliance; and
- Cases that involve violations of orders that present unique or sensitive issues or that have precedential significance throughout the Commonwealth.

DE reviews documents underlying LOAs (the NOV or abbreviated ERP) **only** for consistency in using an LOA for such violations. DE reviews Case Closure memoranda without a full return to compliance **only** to confirm that no enforcement action will practicably lead to further compliance or payment of an appropriate civil charge. DE does not usually review [Informal Corrections](#), [Warning Letters](#), [NOVs](#), [LOAs](#), or [case closure memoranda](#) with a full return to compliance, although RO staff may request a review these or other documents.

DE ordinarily responds to the RO with its written comments within seven working days. DE comments are divided into those that are considered essential to the consistency and enforceability of the document and those that are advisory. Essential elements include:

- Whether the order correctly identifies the Board and Board authority;
- Whether the document identifies a legal RP and uses the proper notary block;
- Whether definitions in an order are needed, correct, or unused;
- Whether the statements concerning the RP and facility type are factually correct;
- Whether all appropriate violations are addressed;
- Whether the observations support violations of the cited legal requirement(s);
- Whether observations and legal requirements support the injunctive relief in the schedule of compliance;
- Whether the injunctive relief in schedule leads by necessity to an RP’s return to compliance by a date certain in all possible cases;
- Whether the civil charge calculations, including economic benefit, are consistent with policy and with similar cases across the Commonwealth;
- Whether any fees, oil spill, and fish kill investigation or replacement costs are addressed;

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<sup>37</sup> An ERP (with civil charge worksheets) and the consent order for the same case can be sent for DE review simultaneously in routine cases. In more complex cases or cases of first impression, RO staff should send the ERP for review before developing the order. ROs should consult the CO Media Manager with any questions. If an ERP requires extensive changes, DE may not review the consent order until the ERP and order are both revised.

- Whether the model formats have been used;
- Whether there have been any changes to administrative provisions;
- Whether the legal citations are correct;
- Whether any SEP conforms to policy; and
- Whether the order is consistent with similar orders across the state.

These are set out in a review checklist ([Attachment 2-30](#)). Not all of the elements are applicable to review of ERPs and can be marked “N/A” in an ERP review.

Comments not essential to the listed elements, particularly word choice and style, are suggested or advisory only. Informal communication during the drafting of comments is encouraged, and every effort is made to offer all comments at once, although multiple changes may result in re-review. DE gives its concurrence by signature, email or ECM workflow after reviewing the documents with the agreed changes. DE staff and the RO must agree on the essential elements of the document under review before a document is first presented to the RP.

Before final execution, DE and the RO must also concur on any significant changes to the essential elements listed above. This includes changes such as: change in RP or entity; modified definitions that change the legal effect; qualitatively different findings of fact and conclusions of law, or corrective action; any change to “Agreement and Order”; civil charges reductions beyond 30% of the gravity-based civil charge; extension of final completion of a corrective action by more than four months; modified or changed SEP project; other significant changes to the model language; and any changes to the administrative provisions. Significant changes may also require a notation on the ERP or an ERP addendum to conform to the consent order.

#### **IV. ENFORCEMENT PROCEDURES WITHOUT CONSENT**

##### **A. ADVERSARIAL ADMINISTRATIVE ACTIONS**

The APA provides two processes for addressing alleged violations through adversarial administrative actions: (1) IFF proceedings under Va. Code [§ 2.2-4019](#) (which can result in a case decision or an [1186](#) Special Order, with duration of not more than 12 months and civil penalties of up to \$10,000); and (2) formal hearings under Va. Code [§ 2.2-4020](#).<sup>38</sup> Formal hearing orders can require an RP to pay civil penalties of up to \$32,500 for each violation, not to exceed \$100,000 per order, if (a) the RP has been issued at least two written NOV<sup>39</sup>s by DEQ for the same or substantially related violations at the same site; (b) such violations have not been resolved by demonstration that there was no violation, by an order issued by the Board or the Director, or by other means; (c) at least 130 days have passed since the issuance of the first NOV; and (d) there is a finding that such violations have occurred after a formal hearing. The DE Adjudications Manager must be consulted when drafting subsequent NOV<sup>39</sup>s in anticipation of

<sup>38</sup> Formal hearings for orders with civil penalties are conducted before a hearing officer from a list at the Virginia Supreme Court, except, upon RP request in a Water case, before a quorum of the SWCB. Va. Code [§ 2.2-4024](#); [§ 62.1-44.15\(8b\)](#). Other SWCB hearings are conducted by at least one Board member. [9 VAC 25-230-150](#). The remaining IFFs can be conducted before an agency subordinate, or “presiding officer.” See Va. Code [§ 2.2-4001](#).

<sup>39</sup> Although the statutes allow for any NOAV, DEQ uses two or more NOVs before a formal hearing for penalties.

a formal hearing. Adversarial administrative actions may also be used when denying, suspending, modifying, or revoking a permit. In such cases, authority for permit actions should also be consulted. *See* Va. Code §§ [10.1-1322](#), [-1322.01](#), and 9 VAC [5-80-260](#) (Air); §§ [10.1-1409](#), [-1427](#) (Waste); and [§ 62.1-44.15\(5\)](#) (Water). Chapter 6 contains procedures for adversarial administrative actions. A form requesting such action is included as [Attachment 2-31](#). Delivery of decisions of the SWCB and Air Board after a formal hearing and time limits are governed by statute. Va. Code [§ 10.1-1309\(C\)](#); §§ [62.1-44.12](#), [-44.28](#).<sup>40</sup>

## **B. EMERGENCY ORDERS**

### **1. Circumstances for Emergency Orders; Model Emergency Order**

Each Board (and DEQ) is authorized by law to issue administrative emergency orders where circumstances require immediate action to abate imminent and substantial injury or damage.<sup>41</sup> In Air and Water, such orders are styled “Emergency Special Orders.” Here they are referred to collectively as “emergency orders.” Staff should review these laws before an emergency order is drafted, including the time allowed for subsequent hearings and the rights of persons subject to the orders. The Office of the Attorney General (OAG) must be consulted throughout. A model emergency order is attached ([Attachment 2-32](#)).

Emergency orders are the administrative equivalent of judicial temporary injunctions. They are effective upon service and are issued without the consent of the RP. DEQ must make “a reasonable attempt to give notice” (Air and Waste), or may give no formal notice (Water), prior to issuance. By law, however, there must be a prompt formal hearing after reasonable notice to the RP to affirm, modify, amend, or cancel the order.<sup>42</sup> Delivery of decisions of the SWCB and Air Board after a hearing on an emergency order and time limits are governed by statute. Va. Code [§ 10.1-1309\(C\)](#); §§ [62.1-44.12](#), [-44.28](#) (*see* section IV.A, above).

### **2. Drafting Emergency Orders**

DE staff draft emergency order in consultation with the RO and OAG, and carry out the following steps when an emergency order is being prepared:

- Determine whether the statutory criteria have been met for an emergency order, including any declarations or findings, and requirements to attempt prior notice;
- Prepare the emergency order, which must set forth:
  - The purpose of the emergency order;
  - The authority to issue the order;

<sup>40</sup> Where notice to the RP is required by statute, it is not sufficient to notify only the party’s attorney. *Broomfield v. Jackson*, 18 Va. App. 854, 858, 447 S.E.2d 880, 882 (1994). Also, whenever the Board or DEQ is required to send any mail or notice by certified mail and such mail or notice is sent certified mail, return receipt requested, then any subsequent, identical mail or notice that is sent by the Board or the Department may be sent by regular mail. *See* Va. Code §§ [10.1-1182.1](#); [10.1-1300.1](#); [10.1-1400.1](#); [62.1-44.3:1](#); and [62.1-255.1](#) (effective July 1, 2011).

<sup>41</sup> Va. Code [§10.1-1309\(B\)](#) (Air); §§ [10.1-1402\(18\)](#) and [\(21\)](#), and [-1455\(G\)](#) (Waste); [§ 62.1-44.15\(8b\)](#) (Water); and [§ 10.1-1197.9\(C\)\(5\)](#) (Renewable Energy).

<sup>42</sup> The Air and Waste statutes specify that the hearing be held within 10 days. Under Water law, if the emergency order requires cessation of a discharge, the Board shall provide an opportunity for a hearing within 48 hours.

- A clear and concise statement of the facts constituting the emergency and any necessary declaration or finding;
- A clear and concise statement of what the Board is ordering the RP to do or refrain from doing; and
- A statement of the RP's right to a subsequent hearing.
- Obtain the services of a hearing officer; and
- Prepare a separate Notice of Hearing, if not included with the emergency order.

### **3. Issuance, Hearing, and Notice to Local Government**

Once the emergency order is signed by the person delegated that authority, DEQ must serve the executed emergency order to the RP by a means that is quick, certain, and verifiable, *e.g.*, hand-delivery, sheriff service, express carrier, or process server. The hearing notice should be served simultaneously, either as a separate document or part of the emergency order. DEQ may transmit a copy of the order by fax if receipt is confirmed. DEQ should also send a copy with delivery confirmation, if not delivered by hand. In the case of emergency orders issued under the Water Law, the issuing staff must notify the ORPA to poll the SWCB members by telephone to schedule an SWCB meeting on the emergency order.

Circumstances that are serious enough to warrant consideration of an emergency order are also likely to require notice to the local government of the alleged violations. *See* Va. Code §§ [10.1-1310.1](#) (Air), [10.1-1407.1](#) (Waste), and [62.1-44.15:4\(A\)](#) (Water).

### ***C. COURT ACTIONS***

After evaluating all other options, the Director may determine that court action is the most appropriate enforcement tool. Generally, DEQ considers civil litigation only after it has exhausted all reasonable administrative remedies, unless there is an emergency. Remedies in court actions include temporary and permanent injunctions and civil penalties. The Attorney General (personally or through his or her assistants) renders all legal services for the Boards and DEQ. Va. Code [§ 2.2-507\(A\)](#). Court actions are covered in more detail in Chapter 7.

A referral to the OAG may be appropriate where:

- There is a serious threat to human health or the environment;
- Enforcement staff has been unable to obtain compliance by any other means;
- An order has been violated;
- There are ongoing violations; or
- The RP has a history of noncompliance.

Only the DEQ Director is authorized to refer cases to the OAG. This authority has not been delegated. All referral packages, once finalized, are sent to the Director for approval.

DE staff prepare referral packages in consultation with RO and OAG staff according to OAG protocol. DEQ discusses each package with the OAG before finalizing it to make sure it is complete and in proper order. DE and RO staff must confirm that the governing statute and

regulations authorize the remedy sought. The referral package contains an authorization-to-sue letter signed by the Director, a memorandum in support of litigation (including recommendations for civil penalties and injunctive relief), and a copy of the case file as an appendix. If the OAG files suit, DE and RO staff assist in case preparation and provide litigation support.

DEQ staff may also receive notice of a citizens' suit under federal law. These notices are handled as "Litigation Documents" under DEQ policy (currently, [Agency Procedure 6-2010](#)), and a copy should be forwarded to DE. DEQ has options in response to the notice, including: (1) petitioning to join the suit; (2) negotiating a separate court decree; and (3) taking no action.

#### ***D. EPA ACTIONS***

DEQ involvement in EPA actions can arise in several ways. If EPA is pursuing a court action against an RP with facilities in several states, DEQ may be invited to join, so that all interested parties are before the court. In such cases, DEQ may refer the matter to the [OAG](#) with a request to join the pending federal action. When EPA undertakes its own inspections of Virginia facilities, it takes enforcement actions in its own name, whether administrative or judicial. DEQ does not join administrative actions, but may join court actions, also after referral to the OAG. Finally, DEQ may refer cases initiated by DEQ staff to EPA; however, such referrals to EPA are not widely used.

##### **1. Circumstances for EPA Referrals**

DEQ considers the following criteria in deciding to refer a case to EPA for enforcement:

- Whether staff has explored and attempted, where appropriate, all reasonable administrative options and such efforts have not resulted in an acceptable conclusion;
- DEQ resources to pursue the case relative to the nature and/or complexity of the case;
- Whether the interstate aspects of the case warrant an action by EPA;
- Whether the RP is out-of-state and beyond the reach of DEQ; and/or
- Whether federal remedies are more appropriate to address the alleged violations.

##### **2. Process for EPA Referrals**

The Director makes all final decisions to refer a case to EPA upon the RD and DE Director's recommendation. Before doing so, the RO and DE discuss the merits of the case, applying the criteria set forth above. DEQ may also receive input from EPA.

If a case is referred, DE staff in conjunction with the RO prepares and sends the referral package from the RD and DE Director to the DEQ Director. The memorandum requests a referral to EPA, explaining how the criteria for referral have been met. The referral package includes a letter from the Director, a brief memorandum outlining the facts of the case, and relevant attachments. The attachments may include the whole file or selected documents (*e.g.*, NOV, draft consent order, reports). DEQ provides additional information to EPA upon request.

### **3. EPA Communications About Compliance and Enforcement Activities**

The DEQ Director has requested that, for EPA enforcement actions (including but not limited to information requests, notices/findings of violation, administrative orders, and referrals to the U.S. Department of Justice), EPA give advance notice to the Director of DE and the appropriate DEQ DD and keep communications open with them as the action progresses. The Director has also asked that these same persons be notified if EPA is scheduling significant inspections, planning targeted inspection initiatives, and/or multimedia inspections. The Director of DE and the DDs are responsible for sharing EPA's information with appropriate DEQ staff and coordinating with EPA appropriately. If RO staff are contacted by EPA about a case or action that has not been previously coordinated, the RO should immediately notify the Director of DE and the appropriate DD.

***E. NOTIFICATIONS OF POTENTIAL CRIMINAL ACTIVITY [Reserved]***  
[Attachment 2-33 – *Reserved*]

## **V. SPECIAL PROCEDURES FOR UST DELIVERY PROHIBITION AND SANITARY SEWER OVERFLOWS**

### ***A. UST DELIVERY PROHIBITION***

The Federal Energy Policy Act of 2005 (EPACT) makes it unlawful for anyone to deliver petroleum into or accept delivery of petroleum into certain noncompliant USTs. EPACT also requires states to promulgate regulations and to develop processes and procedures to implement the delivery prohibition ("red tag") requirement. Part IX of the UST Technical Standards ([9 VAC 25-580-370](#)) has been promulgated to comply with EPACT and EPA guidance. The regulation identifies two broad classes of violations and provides different responses for each. Facilities that are not equipped to comply with UST pollution prevention requirements are subject to an expedited delivery prohibition process. For facilities where there are only operations and maintenance issues, the RP is given the opportunity to come into compliance through more traditional methods before staff begin the delivery prohibition process. Under either class of violations, staff provide notice to the owner/operator and conduct an IFF before a UST is deemed noncompliant and tagged. DEQ has issued guidance on delivery prohibition procedures, which can be found on the TownHall website under [SWCB guidance](#).

### ***B. SANITARY SEWER OVERFLOWS (SSOs)***

The General Assembly has enacted legislation governing administrative orders "requiring corrective action to prevent or minimize overflows of sewage from [a sewerage] system." Va. Code [§ 62.1-44.15\(8f\)](#). These are called "sanitary sewer overflows," or "SSOs." The legislation requires the SWCB to use special procedures for SSO consent orders and SSO formal hearing orders. It also limits civil charges in SSO consent orders to the maximum amount authorized in § 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g) (currently \$16,000 per violation, with a maximum of \$177,500. See [40 CFR Part 19](#)). While mandatory, the statute and procedures are specialized and not often used. The SSO procedures are included as [Attachment 2-34](#).

## VI. MONITORING COMPLIANCE WITH ORDERS AND AGREEMENTS

Monitoring compliance with final orders and agreements is essential for assuring that the RP returns the facility or source to compliance with applicable environmental requirements. For enforcement tools by consent (LOAs, consent orders, ECAs), enforcement staff who negotiate the order or agreement are responsible for monitoring compliance with its terms, unless other staff has been designated in writing. This is ordinarily the DEQ contact identified in the order or agreement. For Adversarial Administrative actions, the DE Adjudications Manager monitors the order. Judicial decrees are assigned on a case-by-case basis. Typically, staff assigned to receive submissions is responsible for monitoring compliance. Computation of time for completing acts required by administrative orders is governed by Va. Code [§ 1-210\(E\)](#).

## VII. ENFORCEMENT CASE CLOSURES

DEQ may close an enforcement case when: (1) an appropriate enforcement action is complete and the RP has returned the facility to compliance; or (2) no enforcement action will practicably lead to further compliance or payment of an appropriate civil charge. Staff use the same Enforcement Case Closure Memorandum for both ([Attachment 2-35](#)).

### A. RETURN-TO-COMPLIANCE CLOSURES

An enforcement case qualifies for return-to-compliance closure when all the terms of any appropriate enforcement instrument have been completed (including any payments), and the RP has returned the facility to compliance on the issues for which it was referred. RO enforcement staff, in consultation with compliance, permitting, or other staff, ascertain whether the party has fulfilled all of the terms of any LOA, consent order, or other enforcement instrument. Staff should also ascertain whether there have been subsequent alleged violations. Where compliance status can change quickly (*e.g.*, DMR violations), staff should confirm that the return to compliance is durable.

To close a case, regional enforcement staff complete the closure memorandum, attach any supporting documentation, obtain the necessary concurrences, and forward the memorandum and attachments for RO management approval. The closure memorandum identifies the RP/facility, the media and program, the permit or other identifying numbers, the violations addressed, the date of the order or other enforcement instrument, and the reason for the closure. It may be accompanied by supporting documentation but must clearly show that all requirements of any enforcement instrument have been completed. A draft letter terminating any LOA, consent order, ECA or administrative order should also be attached, so that the entire matter is brought to management at one time, and the RP is notified of the termination.<sup>43</sup> See [Attachment 2-14](#) (LOA) (RD, DRD, or, if authorized, REM can sign) and [Attachments 2-27](#) and [2-28](#) (consent order). DE concurrence is not necessary for a return-to-compliance closure.

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<sup>43</sup> A separate letter to the RP **from enforcement staff** may not be necessary for an “informal return to compliance” (*i.e.*, if (1) no order is necessary or appropriate; and (2) other DEQ staff have sent a subsequent report or letter acknowledging that the alleged violations have been corrected). Only a court can terminate a judicial order.

After the closure memorandum is approved, RO enforcement staff place it in the file of record, together with a copy of any letter notifying the RP that the enforcement instrument has been terminated. Copies of the memorandum and letter (or a definitive location in ECM) should be sent to permitting or compliance staff and, for consent or other orders and ECAs, to DE to update its records. RO enforcement staff should also update the relevant databases.

## ***B. ADMINISTRATIVE CLOSURES/DEREFERRALS***

In limited circumstances, DEQ may also conclude an enforcement case administratively and close it without a full resolution, when no enforcement action will practicably lead to further compliance or payment of an appropriate civil charge. RO enforcement staff should document that they have obtained as much progress toward full compliance as possible – the enforcement action should at least abate any continuing unpermitted or illegal activities. Reasons for administrative closure/dereferral include, but are not limited to:

- The RP has ceased continuing, non-compliant activities, and no enforcement action will lead to further compliance or payment of an appropriate civil charge. For example, a person has stopped illegally dumping solid waste, and although a deed notation has been filed and the waste covered, the person has a documented lack of resources to complete closure or pay a civil charge;
- The facility has shut down permanently,<sup>44</sup> and DEQ is unable to pursue enforcement;
- There are no liable, viable or identifiable RPs to take an enforcement action against;
- DEQ has taken or considered all administrative enforcement actions, and none has or will result in compliance, and a referral for judicial enforcement is not appropriate.
- Upon further investigation, there is not sufficient evidence to pursue the violation(s) in an enforcement action.

In closing a case administratively, regional enforcement staff prepare a closure memorandum in the same manner as for return-to-compliance closure. The memorandum and attachments should document efforts to obtain full compliance. Consultation and concurrence are required as before, except DE concurrence as to substance is needed to close a case administratively. If DE does not concur, it should state the basis and offer a path to resolution. Since no enforcement action is being taken, there is generally no requirement to notify the RP. However, if the case is being closed for insufficient evidence and substantial negotiations have occurred, the RP should be notified that DEQ is not pursuing the matter at this time. Administrative closure does not limit DEQ's authority to reopen a case should circumstances change or new information be found. As before, regional enforcement staff should send copies and update the relevant databases upon approval.

Administrative closure is not appropriate for RCRA SNC, VPDES SNC, or Air HPV cases, unless DEQ has explored all enforcement avenues. DE ordinarily consults EPA before a final decision not to pursue SNC or HPV cases.

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<sup>44</sup> Note: in UST cases, temporary closure measures and cathodic protection may still be required even though a facility is no longer operating.

## **Chapter 2 – List of Acronyms**

APA - Administrative Process Act, Va. Code [§ 2.2-4000](#) *et seq.*

AST - Aboveground Storage Tank

CAPP - Commonwealth Accounts Payable Procedures

CAS – Compliance Auditing System (Water)

CO – Central Office

DD – Division Director

DE – Division of Enforcement

DEQ – Virginia Department of Environmental Quality

DGIF – Virginia Department of Game and Inland Fisheries

DL – Deficiency Letter

DMR – Discharge Monitoring Report (Water)

ECA – Executive Compliance Agreement

ECM - Enterprise Content Management. ECM is DEQ's electronic document management system. An ECM number refers to the file series and document type of a document in ECM (*e.g.*, ECM 127-1 signifies a consent order or ECA).

EPACT - Federal Energy Policy Act of 2005

ERP – Enforcement Recommendation and Plan

EWP – Employee Work Profile

FOIA – Virginia Freedom of Information Act, Va. Code [§ 2.2-3700](#) *et seq.*

GWM – Ground Water Management Act, Va. Code [§ 62.1-254](#) *et seq.*

IFF – Informal Fact Finding under the APA

HPV – High Priority Violator in the Air Program

ICL – Informal Correction Letter

LOA – Letter of Agreement

NOAV – Notice of Alleged Violation

NOV – Notice of Violation

OAG – Office of the Attorney General, or Department of Law

OFM – Office of Financial Management

ORPA - Office of Regulatory and Public Affairs

PC/IR No. – Pollution complaint or incident response number

PEDR – Process for Early Dispute Resolution

RCA – Request for Corrective (or Compliance) Action

RD – Regional Director

REM – Regional Enforcement Manager

RO – Regional Office

RP - Responsible Party

SCC – State Corporation Commission

SEP – Supplemental Environmental Project

SNC – Significant Noncomplier (Hazardous Waste); Significant Noncompliance (Water)

SSO – Sanitary Sewer Overflow

SWCB – State Water Control Board

UST – Underground Storage Tank

VEEP – Virginia Environmental Excellence Program

VEERF – Virginia Environmental Emergency Response Fund, Va. Code [§ 10.1-2500](#) *et seq.*

VPA – Virginia Pollution Abatement

VPDES – Virginia Pollutant Discharge Elimination System

VPSTF - Virginia Underground Petroleum Storage Tank Fund, Va. Code [§ 62.1-44.34:11](#)

VWP – Virginia Water Protection